ORIGINAL

(2)

No. 90-385

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Joseph Henneberry,

Petitioner,

v.

Richard Lee Sutton,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

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RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Constitutional & Statutory Provisions

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The Respondent, Richard Lee Sutton, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment by the Court of Appeals of Maryland in this case. The opinion below is reported at Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898 (1990); Petition at 1a-43a.

STATEMENT OF THE CASE

Respondent adds the following to the Petitioner's statement of the case. Petition at 2-6.

Patuxent Institution is a nationally unique prison[1] established to treat and rehabilitate inmates with an "intellectual deficiency or emotional imbalance."[2] Patuxent operates independently of, and separate from, all other Maryland state prisons, pursuant to Md. Ann. Code Art. 31B. Decisions to release inmates from the institution have historically been based on considerations of specific deterrence and rehabilitation.[3] There are approximately 600 inmates in the Patuxent program and Petitioner argued below that only 18 of them "may be affected by

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[1] See Watson v. State, 286 Md. 291, 407 A.2d 324, 328 (1979); Sas v. Maryland, 334 F.2d 506, 516 (4th Cir. 1964).

[2] The Institution's statutorily defined purpose is "to provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible persons." Md. Ann. Code Art. 31B, §2(b) (1986 Repl. Vol. & 1989 Cum. Supp.). Appendix at 1a. ("Appendix" refers to this brief, whereas "Petition" denotes the Petitioner's submission.).

"Eligible persons" are defined as individuals (1) convicted of a crime and serving a sentence of imprisonment with at least three years remaining; (2) having an "intellectual deficiency or emotional imbalance"; (3) likely to respond favorably to the Institution's treatment programs; and (4) who can be better rehabilitated at Patuxent than in a more traditional prison. Id. §1(f)(1)(i)-(iv). Appendix at 2a.

[3] Patuxent's parole statutes for 1982, 1976, and 1975 are set forth in the Petition at 52a-54a. In essence, parole decisions have focused on two considerations: whether the inmate's release (1) "will not impose an unreasonable risk on society;" and (2) "will assist in [the inmate's] treatment and rehabilitation." Petition at 4a, 52a & 53a.

[this] case."[4]

Contrary to all other Maryland state prisons, prior to 1982 Patuxent had only one level and standard of parole review for inmates serving life sentences.[5] Petition at 4a, 6a-7a. Once the Patuxent Institutional Board of Review (hereinafter "Board") decided that an inmate had satisfied the statutory criteria, page 2, note 3, supra, he or she was paroled. There was no gubernatorial approval requirement. Petition at 4a. The 1982 statutory change at issue did not disturb the Board's review process, but it added a second layer of review in the form of the Governor's approval. Unlike the Board's parole assessment, however, the Governor's review is not statutorily channelled by any considerations, much less specific deterrence and rehabilitation.[6]

On October 4, 1984, the Board voted 5-2 to parole Mr.

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[4] Opposition to Motion to Dismiss and Reply Brief of Petitioner in the Court of Appeals at 7-8.

[5] Every other Maryland state prison operates under the auspices of the Division of Correction (hereinafter "DOC"). Decisions on parole from the DOC are made by the Maryland Parole Commission, which evaluates inmates from a more traditional perspective, one that includes considerations of general deterrence and retribution in addition to rehabilitation and specific deterrence. Md. Ann. Code Art. 41, §4-506 (1986 Repl. Vol. & 1989 Cum. Supp.). Appendix at 3a. The Governor has been required to approve the parole of DOC "lifers" since 1953. Md. Ann. Code Art. 41, §124 (1957); Md. Ann. Code Art. 41, §4-516(b)(4) (1986 Repl. Vol. & 1989 Cum. Supp.); Petition at 4a-5a.

[6] The relevant statutory language read in 1982, and still reads today, as follows: "An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor." 1982 Md. Laws, Ch. 6; Md. Ann. Code Art. 31B. §11(b)(2). Petition at 8a.

Sutton. Record Extract 18 (hereinafter "E"). The decision was based in part on a psychological evaluation which concluded that Sutton's "characterological problems ... had been modified" and that "all test data show[] no indication of repressed rage or overt tendencies towards violence." Id. If Patuxent had applied the statutory parole scheme in effect on the date of Sutton's offenses, he would have been released on parole in October, 1984. Petition at 36a. However, because of the intervening 1982 statutory change at issue in this case, Patuxent did not release Sutton while awaiting a decision by the Governor. Almost a year later, on September 4, 1985, without having interviewed or met Sutton, the Governor denied the parole without any substantive explanation. E.23.

Pursuant to the Court of Appeals' decision and the Circuit Court's order, the Board paroled Mr. Sutton on August 8, 1990. Petition at 6 n.3. Patuxent did not release Mr. Sutton, holding him on a parole retake warrant pending formal parole revocation proceedings.[7]

On August 30, 1990, the Board, after a hearing, revoked Mr. Sutton's parole for reasons entirely unrelated to the issue presented herein. An appeal of the revocation decision has been noted pursuant to Maryland's Administrative Procedure Act.[8]

Furthermore, on September 27, 1990, the Board voted not to

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[7] See Morrissey v. Brewer, 408 U.S. 471 (1972).

[8] Md. State Gov't Code Ann. §10-201, et seq. (1984 Repl. Vol. & 1990 Cum. Supp.).

reinstate Mr. Sutton on work release and recommended that he again appear before the Board in October, 1990 to determine whether he is still an "eligible person." Should the Board vote to expel him from the program, Mr. Sutton would no longer be subject to Patuxent's jurisdiction, including the statutory provision at issue in this case. He would be returned to the custody of the Division of Correction within 90 days, where any future parole would be subject to the statutes and regulations of the Maryland Parole Commission, Md. Ann. Code Art. 31B, §11(b)(1) (1986 Repl. Vol. & 1989 Cum. Supp.), Appendix at 4a-5a, which have included a gubernatorial approval requirement since long before Sutton's offenses in 1974.[9] See page 3, note 5, supra.

REASONS FOR DENYING THE WRIT

SUMMARY

This case will likely be moot in the near future because the Board has revoked Mr. Sutton's parole and has commenced proceedings to expel him from the program. Even if it is not, the Court of Appeals' decision is a sensible and fair application of relevant ex post facto principles. This Court's subsequent opinion in Collins v. Youngblood[10] endorses the legal reasoning

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[9] Respondent's counsel will notify the Court without delay if and when Mr. Sutton's status changes. Board of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (citation omitted).

[10] ___ U.S. ___, 110 S.Ct. 2715 (1990).

and the outcome of the decision below by reaffirming the applicability of the Ex Post Facto Clause to statutory changes that increase punishment. There is no direct conflict among the courts of the several states on the issue. To the contrary, the one truly similar case, State v. Williams,[11] is in accord. Finally, Petitioner's assertion that the decision "discourag[es] innovation" and will "bar[] states from changing parole procedures," Petition at 7, dramatically overstates the importance of the case.

I. SHOULD CERTIORARI BE GRANTED, THIS CASE WILL LIKELY BE MOOT AT THE TIME OF REVIEW.

Mr. Sutton's revocation from parole leaves in doubt the justiciability of this case. U.S. Const. Art. III, §2, cl. 1. His petition for a writ of habeas corpus sought only injunctive relief, namely, his release on parole. E.10.[12] The requested relief was granted on August 8, 1990 when the Board ordered Mr. Sutton's parole. Petition at 6 n.3.

In proceedings independent of this case, the Board revoked Sutton's parole on August 30, 1990. So although the case would not have been moot had Sutton remained on parole, id., the subsequent revocation means that the "issues presented are no longer live [and] the parties lack a legally cognizable interest

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[11] 397 So. 2d 663 (Fla. 1981).

[12] There is no damage claim, E.7-10, nor has class action status been requested or granted.

in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). Whether or not the Governor is permitted to veto Sutton's parole is immaterial since Sutton is no longer under consideration for parole.[13] The Board could again recommend Sutton for parole in the future, but the fact that they are recommending that he be found "non-eligible" for the program indicates their current belief that he is not likely to be rehabilitated. See page 2, note 2, supra (definition of "eligible person"). This "Court has never held that a mere physical or theoretical possibility [of recurrence] was sufficient to satisfy the [capable of repetition yet evading review] test...." Murphy v. Hunt, 455 U.S. 478, 482 (1982).

If Mr. Sutton is determined to be a "non-eligible" person and is returned to the custody of the DOC, he will no longer be subject to the statute at issue, and the case will be moot because "in no event will the status [of Sutton] now be affected by any view this Court might express on the merits of this controversy." Defunis v. Odegaard, 416 U.S. 312, 316 (1974). See Honig v. Doe, ___ U.S. ___, ___, 108 S.Ct. 592, 601 (1988) (respondent's claim moot because no longer entitled to protections of statute at issue); Board of School Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128, 129 (1975) (graduation of plaintiffs who challenged school rule moots claims).

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[13] Resolution of Mr. Sutton's appeal of the parole revocation decision will take several months. It is an intangible that further obscures the justiciability of the case.

II. COLLINS V. YOUNGBLOOD ENDORSES THE REASONING OF THE COURT OF APPEALS BY REAFFIRMING THE APPLICABILITY OF THE EX POST FACTO CLAUSE TO STATUTORY CHANGES THAT INCREASE PUNISHMENT.

The Court of Appeals' decision is fully consistent with this Court's subsequent opinion in Collins v. Youngblood, despite the fact that Youngblood overruled two cases cited by the court below.

The issue in Youngblood was whether changes in a post conviction remedy were subject to the Ex Post Facto Clause. In deciding that they were not, the Court clarified the scope of the clause. Language in Kring v. Missouri, 107 U.S. 221, 228-229 (1883) (any change which "alters the situation of a party to his disadvantage"), and Thompson v. Utah, 170 U.S. 343, 352 (1898) (any change that deprives defendant of "a substantial right"), had "caused confusion in state and lower federal courts about the scope of the Ex Post Facto Clause...", Youngblood, ___ U.S. at ___, 110 S. Ct. at 2722 (emphasis added), and had resulted in an unjustified "enlargement" of the Clause. Id. at ___, 110 S. Ct. at 2721. The Court reiterated that its "early opinions" established "an exclusive definition of ex post facto laws." Id. at ___, 110 S. Ct. at 2719 & 2721 ("The prohibition which may not be evaded is the one defined by the Calder categories."). Accordingly, the four categories set out in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798),[14] and restated in Beazell v. Ohio, 269

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[14] The four Calder categories are:

1st. Every law that makes an action done

U.S. 167, 169-70 (1925), define the scope of the clause. Youngblood, ___ U.S. at ___, 110 S. Ct. at 2720 & 2721.

Youngblood reaffirms the longstanding proposition that the Ex Post Facto Clause prevents legislatures from retroactively increasing the punishment for criminal acts. ___ U.S. at ___, 110 S.Ct. at 2719-20. To the extent statutory changes make parole more difficult to obtain, they also make more burdensome the punishment for the crime and increase the effective sentence by "the reduced opportunity to shorten ... time in prison...." Weaver v. Graham, 450 U.S. 24, 33-34 (1981).

The Supreme Court has expressly recognized the applicability of the Ex Post Facto Clause to good time credits, which reduce the amount of time inmates must actually spend in prison. Weaver v. Graham, supra. The Court stated that such credits were "one determinant of ... a prison term -- and [the] effective sentence is altered once this determinant is changed." 450 U.S. at 32 & 34. Weaver specifically relied on a case holding that a statute delaying parole eligibility violated the Ex Post Facto Clause,

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> before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. (3 Dall.) at 390 (emphasis in original).

id. at 31-32, citing Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979), a fact noted in the Court of Appeals' opinion. Petition at 34a.[15]

Weaver also cited with approval several earlier Supreme Court cases that implicitly or in dicta affirmed application of the Ex Post Facto Clause to parole. 450 U.S. at 32. In Greenfield v. Scafati, 277 F. Supp. 244 (D. Mass. 1967) (three-judge court), summarily aff'd, 399 U.S. 713 (1968), Massachusetts had changed its law to permit forfeiture of good time deductions for a violation of parole. In holding unconstitutional the retrospective application of the law, the district court stated that there was "no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole." 277 F. Supp. at 646. In Warden, Lewisburg Penitentiary v. Marrero, the Court stated in dicta that:

> a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause ... of whether it imposed a "greater or more severe punishment than was prescribed by the law at the time of the ... offence...."

417 U.S. 653, 663 (1974) (emphasis in original) (citations

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[15] Petitioner contends that the Court of Appeals' reliance on Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443 (1883), which was overruled by Youngblood somehow renders the decision infirm. The reference to Kring by the court below is preliminary language in the introductory section of the discussion. 31a-32a. Excision of it does not materially affect the disposition. The Court of Appeals relied on Weaver v. Graham and numerous other cases for the proposition that retrospectively applied changes in parole are subject to ex post facto scrutiny. Petition at 32a-36a.

omitted).[16]

Weaver also spoke generally of "a prisoner's eligibility for reduced imprisonment" as a significant factor in defendants' decisions to plea bargain and judges' sentence calculations. 450 U.S. at 32. This supports the proposition that good time credits and parole are a determinant of a defendant's punishment. See Marrero, 417 U.S. at 658.

Federal appeals courts have unvaryingly held applicable the Ex Post Facto Clause to parole, following Weaver, Greenfield and Marrero.[17]

Given the uniform application of the Ex Post Facto Clause to parole changes, the Court of Appeals' decision is well within the parameters of pre-Youngblood case law, the overruling of Kring and Thompson notwithstanding. Since changes in parole directly impact on "punishment," squarely falling within the third of the Calder categories, the Court of Appeals' decision also is in line with Youngblood.

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[16] Marrero also cites Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), where the court of appeals held unconstitutional the agency's new statutory interpretation that delayed the offender's parole eligibility. 417 U.S. at 663.

[17] See, e.g., Parton v. Armontrout, 895 F.2d 1214 (8th Cir. 1990); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Devine v. New Mexico Dep't of Corrections, 866 F.2d 339 (10th Cir. 1989); Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988); Burnside v. White, 760 F.2d 217, 220 (8th Cir. 1985), cert. denied, 474 U.S. 1022; Lerner v. Gill, 751 F.2d 450 (1st Cir. 1985), cert. denied, 472 U.S. 1010; United States Ex Rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir. 1980); Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979); Gheraghty v. United States Parole Comm'n, 579 F.2d 238, 265 (3rd Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 654 (2nd Cir. 1977).

The focus of the case, therefore, shifts to whether the gubernatorial approval requirement "disadvantaged" Sutton. Miller v. Florida, 482 U.S. ___, ___, 107 S. Ct. 2446, 2451 (1987).[18] Again, Youngblood implicitly affirms and strengthens the decision below. Chief Justice Rehnquist, writing for the Court in Youngblood, stated as follows:

> [S]imply by labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. ... Subtle ex post facto violations are no more permissible than overt ones.

___ U.S. at ___, 110 S. Ct. at 2721 (citation omitted).

In this case, the Court of Appeals determined that the 1982 law disadvantaged Sutton, not only by making parole objectively more difficult to obtain, but also because it had "in fact become more difficult" since the Governor had vetoed the Board's parole recommendation. Petition at 36a.[19] The Governor's denial of

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[18] It is beyond dispute that Patuxent has applied the law retrospectively, Petition at 8a-9a, which satisfies the first Miller criterion.

[19] The 1982 law imposes a more onerous burden on inmates by expanding the reasons for which parole can be denied. The Board's discretion is channelled by the Institution's enabling statute, which requires it to consider the inmate's risk to society and the extent of his rehabilitation. Md. Ann. Code Article 31B, §11(b)(2) (1986 Repl. Vol.); Petition at 52a, 53a, 54a. Conversely, Md. Ann. Code Art. 31B, §11(b)(2) legislates no standards or guidelines circumscribing the Governor's decision. The absence of standards is, a fortiori, a different set of criteria than that binding Patuxent's Board. Moreover, as the State's highest elected official, the Governor is susceptible to shifting political winds and the pressures of public opinion in a way the parole board is not. The fact that the Governor's decision is made without any personal interaction with the inmate lends credence to the proposition that he considers factors other than whether the inmate has been rehabilitated and is no longer a threat to public safety.

parole to twelve inmates who were approved by the Board[20] is evidence that the standards applied by the Governor are more onerous than those of the Board. Unlike in Dobbert v. Florida,[21] where the change in law could result in a life sentence rather than the death penalty for the defendant, see discussion at page 14, note 22, infra, here the Governor is not permitted to parole individuals whom the Board does not first approve.

Under the circumstances, the disadvantage to Sutton is substantially more than "de minimis," having kept Sutton incarcerated for almost six years after the Board's decision to parole him.

III. THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND THAT OF OTHER STATES. INDEED, THE ONE FACTUALLY SIMILAR CASE IS CONSISTENT WITH THIS ONE.

The allegedly conflicting decisions cited by Petitioner are distinguishable on their facts. These cases, in the Petitioner's words, changed the "identity and/or size of the parole or release decision maker." Petition at 12. Not one of the cases added a new and second level of review, as occurred herein. Accordingly, these cases are distinguishable on the ground that there is no evidence of disadvantage, and the respective courts' holdings are

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[20] Emergency Motion of the State of Maryland For Stay of Judgment of The Maryland Court of Appeals Pending Filing and Disposition of Petition For Writ of Certiorari, Case No.: A-19 (filed July 5, 1990) at 5 n.5. The application was denied on July 9, 1990.

[21] 432 U.S. 282 (1977).

premised precisely on this point.[22]

In cases where the composition or size of a decision-making body is altered, there is no change in the standard or measure for getting parole. Furthermore, under those circumstances it is virtually impossible to demonstrate that the former decision-maker would have acted more benevolently toward the prisoner than the existing board. Here, where a second reviewing authority is

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[22] The death penalty law changes at issue in Dobbert v. Florida, 432 U.S. 282, 293 (1977), were not disadvantageous, i.e., "no change in the quantum of punishment attached to the crime." Id. at 294. On the contrary, the Dobbert Court determined that the net effect of the changes was "ameliorative." Id. at 296. See also id. at 303-304 (Burger, C.J., concurring). The Court held that the law was passed with the intent to provide, and in effect did furnish, more judicial protection for defendants in capital cases by making it more difficult to issue death penalties. Id. at 295. The changes in the instant case cannot be characterized as ameliorative, nor were they intended to improve the opportunities for release from Patuxent. The Court of Appeals distinguished Dobbert on these grounds and on the basis that in Dobbert "the trial judge was substituted for the jury as the sole decision maker," whereas the gubernatorial approval provision is an "additional requirement." Petition at 37a-38a.

The Petitioner's other citations are no more apposite. State v. Valenzuela, 144 Ariz. 43, 659 P.2d 732 (1985) (change substituting commissioner of corrections for parole board to determine good time forfeitures not disadvantageous); Perkey v. Psychiatric Security Board, 65 Or. App. 259, 670 P.2d 1061, 1063 (1983) ("[T]he change has not prejudiced him in any way...."); Mayfield v. Ford, 664 F. Supp. 1285, 1289 (D. Neb. 1987) ("[N]othing in the statute gives any indication that a patient's commitment will be increased. In fact, it could just as easily be shortened...."); Taylor v. Lane, 191 Ill. App. 101, 546 N.E.2d 1178, 1180-81 (1989) ("[I]ncrease in number of Board members may actually increase petitioner's chances for parole."); United States ex Rel. Chaka v. Lane, 685 F. Supp. 1069, 1072 (N.D. Ill. 1988) ("merely codifies prior law" and therefore is not disadvantageous); Gilmore. v. Kansas Parole Board, 243 Kan. 173, 756 P.2d 410, 415-16, cert. denied, 488 U.S. 930 (1988) (increase in percentage of votes needed to get parole not unconstitutional because internal administrative policy decision not fixed by legislature).

added to, and given veto power over, an existing one, disadvantage is demonstrable. But for the new law introducing the Governor into the parole decision-making scheme, Mr. Sutton would have been released on parole in 1984. The statutory change not only imposes a higher standard for attaining parole, but also actually disadvantaged Sutton.

In one case that is factually similar to this one, State v. Williams, 397 So. 2d 663 (Fla. 1981), the Florida Supreme Court held exactly as did the Court of Appeals of Maryland. In Williams, subsequent to the commission of the offense but prior to trial and sentencing, Florida's legislature passed a law permitting the trial courts to retain jurisdiction for the first one third of the sentence, which allowed the judges to veto paroles. Id. at 664. In holding unconstitutional the retrospective application of the law, the Florida Supreme Court stated that "[the change] in effect imposes an additional requirement before a prisoner can be paroled: he must obtain the approval of both the parole commission and the trial court, as compared to just the commission's approval as it was under the prior law," id., and therefore the "consequences [of the law] have a disadvantageous effect in that the prisoners' sentences are enhanced." Id. at 665.

IV. THE EFFECT OF THE DECISION IS LIMITED TO A UNIQUE SETTING.

The decision affects only a handful of Patuxent inmates, estimated by Petitioner to be 18. See pages 2-3, supra. Moreover, Petitioner has not directed this Court to other states

with similar parole configurations facing ex post facto challenges, and respondent's counsel is not aware of any. The case is limited to the Patuxent Institution.

Petitioner's apocalyptic argument that the decision will prevent states from improving their criminal justice systems and "discourage[] innovation" (pages 6-7) is belied not only by the Ex Post Facto Clause itself, but by recent legislation in Maryland and elsewhere. As the constitutional provision applies only to retrospective changes, new parole and criminal justice measures can always be applied prospectively without running afoul of the Article I proscription. Indeed, the federal government and many states have, for ex post facto reasons, set up different parole and gain time policies depending on the date of an inmate's offense.[23]

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[23] Upon deciding to eliminate parole in the federal system, Congress enacted an elaborate scheme to safeguard the parole opportunities of inmates whose offenses occurred before repeal of the law. See 18 U.S.C. §3551 (historical note)(1985); Pub. L. No. 98-473, 98 Stat. 1988 (1984) (repealing 18 U.S.C. §4201, et seq. (1990 Cum. Supp.)). In Maryland, the Parole Commission has three separate sets of parole standards, depending on the date of an inmates's offense. Maryland Parole Commission Guidelines 2-7, 2-7A, and 2-1. See also Barksdale v. Franzen, 700 F.2d 1138, 1040-41, n.2 (7th Cir. 1983)(Illinois good time policy); State v. Valenzuela, 695 P.2d 732 (Ariz. 1985) (Arizona good time policy).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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List of Appendices

§ 2. Institution created and continued; purpose.

(a) The Patuxent Institution is created and continued as part of the Department.

(b) The purpose of the Institution is to provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible persons. This shall include a range of program alternatives indicated by the current state of knowledge to be appropriate and effective for the population being served. As an integral part of the program an effective research and development effort should be established and maintained to evaluate and recommend improvements on an on-going basis. (1977, ch. 678, §§ 6, 7; 1989, chs. 6, 7.)

Effect of amendment. — Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each in (b), substituted "treatment with the goal of" for "the treatment and" in the first sentence.

§ 1. Definitions.

(a) In this article, the following words have the meanings indicated unless the context clearly requires otherwise.

(b) "Board of review" means the institutional board of review, created by § 6.

(c) "Commissioner" means the Commissioner of Correction.

(d) "Department" means the Department of Public Safety and Correctional Services.

(e) "Director" means the director of Patuxent Institution.

(f) (1) "Eligible person" means a person who (i) has been convicted of a crime and is serving a sentence of imprisonment with at least three years remaining on it, (ii) has an intellectual deficiency or emotional unbalance, (iii) is likely to respond favorably to the programs and services provided at Patuxent Institution, (iv) can be better rehabilitated through those programs and services than by other incarceration, and (v) meets the eligibility criteria established by the Secretary under § 8 of this article.

(2) "Eligible person" does not include a person who (i) is serving 2 or more sentences of imprisonment for life under the provisions of Article 27, § 412 of the Code, (ii) is serving 1 or more sentences of imprisonment for life when a court or jury has found, beyond a reasonable doubt, that one or more aggravating circumstances existed under the provisions of Article 27, § 413 of the Code, or (iii) has been convicted of murder in the first degree, rape in the first degree, or a sexual offense in the first degree, unless the sentencing judge, at the time of sentencing or in the exercise of the judge's revisory power under the Maryland Rules, recommends that the person be referred to the Institution for evaluation.

(g) "Evaluation team" means a team of at least three professional employees of the Institution, one of whom shall be a social worker or behavioral scientist, one a psychologist, and one a psychiatrist.

(h) "Institution" means the Patuxent Institution.

(i) "Secretary" means the Secretary of Public Safety and Correctional Services.

(j) "Victim" means:

(1) A person who suffers personal physical injury or death as a direct result of a crime; or

(2) If the victim is deceased, a designated family member of the victim. (1987, ch. 164; 1989, chs. 6, 7.)

Effect of amendment. — The 1987 amendment, effective July 1, 1987, in subsection (g), designated the provisions of the subsection as paragraph (1), redesignated former items (1), (2), (3), and (4) as present items (i), (ii), (iii), and (iv) therein, and added paragraph (2).

Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each deleted former (b) and redesignated the remaining subsections accordingly; in (f), deleted "and" preceding "(iv)" in (1) and "or" preceding "(ii)" in (2) and added (v) in (1) and (iii) in (2); and added (j).

§ 4-506. Matters to be considered at hearing.

Each hearing examiner and Commission member determining if an inmate is suitable for release on parole shall consider:

(1) The circumstances surrounding the crime;

(2) The physical, mental, and moral qualification of the inmate eligible for parole;

(3) The progress of the inmate during his confinement, including the academic progress of the inmate in the mandatory education program required in § 22-102 of the Education Article;

(4) Whether or not there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law;

(5) Whether or not release on parole of the inmate is compatible with the welfare of society;

(6) An updated victim impact statement or recommendation prepared under § 4-504 (d) of this subtitle; and

(7) Any recommendation made by the sentencing judge at the time of sentencing. (1976, ch. 540, §§ 1, 3; 1986, ch. 5, § 4; 1987, ch. 11, § 2; ch. 621; 1988, ch. 6, § 1; ch. 486.)

MD. ANN. CODE ART. 31B, section 11 (1986 Repl. Vol. & 1989 Cum. Supp.).

§ 11. Release from Institution.

(a) *Upon expiration of sentence.* — A person confined at the Institution shall be released upon expiration of his sentence in the same manner and subject to the same conditions as if he were being released from a correctional facility. The director shall notify the Commissioner 30 days prior to the release.

(b) *Action by board of review prior to expiration of sentence.* — After transfer of a person to the Institution for treatment as an eligible person but prior to the expiration of the person's sentence, the board of review, upon review of the person may take the following action:

(1) If the board of review concludes that the person is no longer an eligible person but should remain confined until released on parole in accordance with normal Parole Commission standards or expiration of his sentence or the inmate requests a transfer in writing, the director shall notify the Commissioner and send him a copy of the evaluation team's report. Within 90 days after that notice, the person shall be delivered to the appropriate correctional facility designated by the Commissioner. This transfer shall not affect any right to parole consideration that the person may then have.

(2) If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it may grant a parole from the Institution for a period not exceeding one year.

(3) An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor.

(4) Except as provided in paragraph (5) of this subsection, a person who has been sentenced to life imprisonment for rape in the first degree, a sexual offense in the first degree, or murder in the first degree is not eligible for parole until the person has served 15 years or the equal of 15 years when considering allowances for diminution of the period of confinement provided for in Article 27, §§ 638C and 700 of the Code.

(5) A person who has been sentenced to life imprisonment as a result of a proceeding under Article 27, § 413 of the Code is not eligible for parole until the person has served 25 years or the equal of 25 years when considering the allowances for diminution of the period of confinement provided for in Article 27, §§ 638C and 700 of the Code.

(6) The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

CONT'D

(c) *Notice of hearing and decision to victim; comment.* — (1) The board of review shall provide by mail written notice of an eligible person's parole hearing to the victim.

(2) The board of review shall give the victim a reasonable opportunity to comment on the parole in writing before the board decides whether to grant parole to an eligible person.

(3) The board of review shall promptly notify the victim of the decision of the board of review regarding parole.

(4) The victim may designate, in writing to the board of review, the name and address of a representative, who is a resident of the State, to receive notice for the victim.

(5) The board of review shall delete the victim's address and phone number before examination of any document by the eligible person or the eligible person's representative.

(d) *Approval by Secretary.* — The board of review may not release an eligible person on parole until the parole decision has been approved by the Secretary.

(e) *Completion of three years on parole.* — If a person has successfully completed three years on parole without violation, and the board of review concludes that he is safe to be permanently released, it may, through the director, petition the court that last sentenced the person to (1) suspend the person's remaining sentence and terminate parole supervision upon the conditions the court deems appropriate or (2) vacate the person's remaining sentence. Notice of this petition shall be served upon the victim and the State's Attorney that last prosecuted the person, and the State's Attorney shall be a party to the proceeding. After a hearing, the court may either grant or deny the relief requested in the petition. (1977, ch. 678, §§ 6, 7; 1982, ch. 588; 1988, ch. 438; 1989, chs. 6, 7.)

Effect of amendment. — The 1988 amendment, effective July 1, 1988, reenacted the section without change.

Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each designated the former second sentence of (b) (2) as present (b) (3); inserted present (b) (4) and (b) (5); designated the former third and fourth sentences of (b) (2) as present (b) (6); inserted present (c) and (d); redesignated former (c) as present (e); in (b), substituted "after" for "at any time after" in the introductory language and "may" for "shall" in (2); and in (e), inserted "victim and the" in the second sentence.

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JAMES J. NOLAN, JR., PRESIDENT

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October 4, 1990

HAND-DELIVERED

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

RE: Joseph Henneberry v. Richard Lee Sutton
October Term, 1990; No.: 90-385

Dear Mr. Spaniol:

I enclose for filing one copy of Respondent's Brief In Opposition, a Motion for Leave to Proceed *In Forma Pauperis* and supporting Affidavit, and a Rule 29 Certificate of Service.

Very truly yours,

Witold J. Walczak
Attorney for Respondent

cc: Evelyn O. Cannon, Esq.